shall be elected every two years, on the second Tuesday in June, a mayor and six councilmen, and that the mayor and councilmen shall constitute the council of the town.

It is clear, therefore, that by section 117, art. 8, of the Constitution [Va. Code 1904, p. ccxxxviii], the act of March 24, 1874, incorporating the town of Pamplin City, as amended by the act of March 31, 1875, was amended so as to conform to the new Constitution; and "section 117 is self-executing so far as it * * * amends the charters of towns and cities, so as to make them conform to the provisions of the Constitution." Hicks *v.* Bristol, 102 Va. 861, 47 S. E. 1001; Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

The mayor and council of the town of Pamplin City, appellants here, having been duly elected and qualified in conformity with the provisions of the general law for the government of cities and towns in the commonwealth, are the duly and legally constituted government of the town until their successors be duly elected and qualified, and under the original charter of the town, as amended as before stated, the council is clothed with power to levy taxes within the limits prescribed in the charter. Therefore the tax here complained of, so far as this record discloses, is within the limits of the power of the council to levy, legal and valid, and its collection should not have been enjoined.

For the foregoing reasons, the decree appealed from must be reversed and annulled; and this court will enter such decree as the circuit court should have entered, dissolving the injunction awarded in the cause, with costs to appellants.

DOUGLAS LAND CO. *v.* THAYER CO.

Sept. 12, 1907.

[58 S. E. 1101.]

1. Boundaries—Evidence—Documentary Evidence.—Where, in partition, several tracts were allotted to the parties, and the deeds to them called for the lines of designated patents, the patents were relevant evidence on the issue of the boundary line between the tracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 160.]

2. Same—Acts of Parties—Evidence—Admissibility.—Where, in a suit involving the boundary line between plaintiff's and defendant's lands, it appeared that an agent of defendant, while endeavoring to determine the true line, adopted a corner and marked timber to identify it, proof that a third person, who owned land adjoining the land of defendant, pointed out to the agent the corner, was admissible in

support of plaintiff's claim that the line from the corner was the correct line.

3. Same.—In a suit involving the location of a boundary line, the admission in evidence that a witness received from plaintiff's counsel, in the presence of the counsel and general manager of defendant, instructions with respect to the running of a line from designated points, was not erroneous, where the counsel and manager of defendant likewise directed the running of the line.

4. Same—Documentary Evidence.—In a suit involving the location of a boundary line, a deed of a part of the land allotted to plaintiff's predecessor in title, in a suit for partition, and which called for the dividing line between that allotment and defendant's land, was relevant to show that the vendors in the deed claimed the line as called for in the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 160.]

5. Same—Acts of Parties.—In a suit involving the location of a boundary line, the testimony of a witness that he had heard an agent of defendant say that it had twice run the boundary line was relevant to show the acts done by defendant in its efforts to locate its boundary lines.

6. Writ of Error—Erroneous Admission of Evidence—Right to Complain.—A party eliciting evidence to establish a fact cannot avail himself of an objection to evidence of the adverse party establishing the same fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3597.]

7. Boundaries—Evidence—Admissibility.—Where, in a suit involving the location of a boundary line, there was evidence to prove that the lines and corners of an entry were identical with the calls of a patent, the entry was admissible, especially where some of the marked trees in the entry were called for in the deeds under which the parties claimed.

8. Writ of Error—Exclusion of Evidence—Review.—Where the record is silent as to what answers were expected to be elicited from questions propounded, the sustaining of objections to the questions was not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Appeal and Error, §§ 2905-2909.]

9. Witnesses—Competency—Transactions with Deceased Persons.—One having no interest in a suit involving the location of a boundary line, and connected with it only as surveyor and witness, may testify with reference to the direction given him by the general manager of defendant as to how a line should be run, though the general manager is dead.

10. Boundaries—Evidence—Conduct of Parties—Admissibility.—In a suit involving the location of a boundary line, the testimony of a

surveyor with reference to the direction given him by the general manager of one of the parties as to the running of a line is admissible as against the objection that the manager had no authority to make parol disclaimer of the title of his employer.

11. Same—General Reputation—Admissibility.—Parol evidence of the general reputation and tradition with respect to the corner of an ancient patent and the old line between Virginia and Tennessee is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 155.]

12. Writ of Error—Admission of Evidence—Exceptions—Review.—Where, in a suit involving the location of a boundary line, evidence of the location of a corner of an ancient patent had been admitted without objection, an exception to evidence of the general reputation and tradition with respect to the corner was not available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

13. Evidence—Opinion Evidence—Admissibility.—The opinion of a witness that a corner of an ancient patent was on the old state line is incompetent.

14. Writ of Error—Harmless Error—Erroneous Admission of Evidence.—Where, in a suit involving the location of a boundary line, evidence that third persons had made statements to the agent of defendant which had been acted on by him in attempting to locate the boundaries was admitted, evidence that the third persons had made similar statements to others was not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

15. Evidence—Self-Serving Declarations.—In a suit involving the location of a boundary line, the testimony of a witness that a particular line was plainly marked is admissible as against the objection that the evidence is self-serving, on the ground that the line had been recently marked.

16. Boundaries—Evidence—Admissibility.—Where the call in a deed is for a line over "Cat Face" to a tree, evidence of the location of the natural monument referred to by the designation "Cat Face," together with the traditional derivation of the name, was admissible to identify and locate the call.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 155, 178.]

17. Writ of Error—Admission of Evidence—Exceptions—Review.—Where the exception to the refusal of the court to strike out evidence does not point out the specific evidence objected to, the exception cannot be regarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1620.]

18. Trial—Instructions—Ignoring Evidence.—Where, in a suit in-

volving the location of the boundary line between tracts as partitioned among the heirs of a decedent, the controlling inquiry was as to the location of the line fixed by the commissioners and confirmed by the court, an instruction ignoring the theory that the parties had acquiesced in the line for which one of the parties contended, and yielding precedence to the supposed intention of the commissioners, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 613.]

19. Same—Undue Prominence to Particular Matters.—An instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relative to the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 577.]

Error to Circuit Court, Washington County.

Action by the T. W. Thayer Company against the Douglas Land Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Daniel Trigg, Fulkerson, Page & Hurt, and *J. C. Radgett,* for plaintiff in error.

White & Penn, for defendant in error.

WHITTLE, J. This case involves the location of the true dividing line between the lands of Mrs. Monroe and George Douglas, Jr. (predecessors in title respectively of the defendant in error, the T. W. Thayer Company, plaintiff in the lower court, and the defendant, the Douglas Land Company, the plaintiff in error), both of whom derived title from a common source, their father, George Douglas, as established by the commissioners and confirmed by the circuit court of Washington county in the suit to partition the lands of George Douglas, deceased, amongst his heirs.

The plaintiff brought an action of trespass on the case against the defendant and its lessee, the Laurel River Lumber Company, to recover damages for the alleged cutting and removing of timber from its premises, and to an adverse judgment against the defendants this writ of error was allowed.

The lands which were the subject of partition consisted of three tracts—one containing 62,800 acres, another 10,712 acres, and the third 13,655 acres. The first two tracts, which embrace the land in controversy, were patented to James Heron December 14, 1795. The three tracts were divided into four parcels. The eastern portion of the largest tract was allotted to William Douglas, the central portion to Mrs. Cruger, and the western to Mrs. Monroe, while the two smaller tracts were allotted to

George Douglas, Jr. The partition was confirmed in 1846, and carried into deeds in severalty by a special commissioner appointed by the court for that purpose. The deed to Mrs. Monroe calls for the northwest and southwest corners of the 62,800-acre tract, and also for the eastern lines of two older patents, Hunt's and Furman's. The calls in the deed to George Douglas, Jr., are for the northeast corner of the Hunt patent and Mrs. Monroe's western division line. The disputed lines are from "M" to "C" (contended for by the plaintiff), and from "O" to "5," and thence to the end of the dotted line (claimed by the defendants), as shown on the "Buchanan Map," a copy of which is filed with this opinion.

The action of the court in admitting in evidence the Hunt and Furman patents constitutes the first ground of exception.

As remarked, the lines of these patents are called for in the partition deeds, and they are, therefore, relevant evidence to sustain the theory of the plaintiff as to the true line between the claimants. The land included in the Furman patent adjoins the Hunt patent on the south, and the eastern boundary lines of the two patents are coincident, and according to the claim of the plaintiff constitute in part the western line of the 62,800-acre patent. The patents and deeds in the line of the Douglas title refer to the Hunt land and Furman land interchangeably as the Hunt and Furman land, and evidence was admissible to prove that both tracts were sometimes called the "Hunt land."

The next exception is to the admission of the testimony of the surveyor, Buchanan, that the Debusks, who owned part of the Hunt land adjoining the Douglas land, pointed out to Gen. Greever the northeast corner of the Hunt patent at "C."

Greever was the agent of the defendant, the Douglas Land Company, and was endeavoring to determine the true line between Mrs. Monroe and Douglas, and there was evidence tending to show that he adopted the corner at "C" and marked timber to identify it. This evidence was admissible as conducing to establish the plaintiff's claim that the line from "M" to "C" was the correct line.

In Harriman *v.* Brown, 8 Leigh (Va.) 706, Judge Tucker observes: "It is not the mere declaration of Milburn that the witness gives in evidence; but it is an act, to wit, the showing of certain corner trees, which the general reputation of the neighborhood fixed upon as the corners to Harriman's land. * * * Even if Milburn's showing certain trees as the corners of the land was not evidence to establish them as corners, the fact that he pointed out trees, which by other evidence are established as true corners, could not be rejected.

The objection to the testimony of the same witness, that he had received direction from plaintiff's counsel to run the line from "M" to "F," is also without merit. The instruction was

given in the presence of counsel for the defendants and their general manager, and the latter likewise directed the running of the line. But it was also proper, by way of inducement, to show why the witness ran the line.

There was, moreover, an exception to the admission of what is known as the "Clement deed." That deed embraced 2,574 acres of the western portion of the land allotted to Mrs. Monroe, and called for the dividing line between that allotment and the defendant's land as its western boundary, and was relevant as tending to show that Clement's vendors, who were vendees in the line of Mrs. Monroe's title, claimed the line "M" to "F" as their western boundary line.

The next objection was to the admission of the statement of the witness Buchanan that he had heard Gen. Greever say that the Douglas Land Company had twice run the northern line of the 62,800-acre patent.

We think this was relevant evidence to show acts done by the defendant in its efforts to locate its lines. But, if the testimony were objectionable, the same fact was elicited by the defendant, and consequently cannot be availed of. Thornton *v.* Garr, 87 Va. 315, 12 S. E. 753; Va. & S. W. Ry. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

Excepton 9 was to the introduction of the Fulton entry of April 8, 1837.

There was evidence going to prove that the lines and corners of that entry were identical with the calls of Hunt's patent, and it was offered to explain the presence of newly marked timber in the lines of that patent; and, besides, the evidence is admissible, because some of the marked trees in the entry are called for in the partition deeds.

In Clement *v.* Packer, 125 U. S. 332, 8 Sup. Ct. 907, 31 L. Ed. 721, it was held that, when the lines and corners of a senior patent had become uncertain, evidence showing the lines of a junior patent, which called for those of the senior patent, was admissible, not as controlling, but to aid in identifying the older lines.

Exceptions 10, 11, and 12 are to the action of the court in refusing to permit the witness Buchanan to answer certain hypothetical questions.

It is sufficient to say, with respect to those exceptions, that the questions propounded were not within the scope of expert testimony, and, if they had been, the record is silent as to what answers were expected to be elicited. Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658.

Exception 13 involves the action of the court in overruling the motion of the defendant to exclude the testimony of the same witness with reference to the direction given him by Watson, general manager of the Douglas Land Company, to run the line

from "M" to "F," on the ground that Watson was dead, and, furthermore, that he had no authority to make a parol disclaimer of the title of his principal.

The ruling was right in both particulars. Buchanan's connection with the case was merely as surveyor and witness, and he had no interest whatever in the litigation. In no sense was he a party to the controversy, and hence the rule of exclusion invoked was not applicable. Nor was the direction alleged to have been given by Watson a disclaimer of title in his principal. It was only an acquiescence on his part to running a line which might throw light on the question at issue.

Exceptions 14 and 14½ involve the admissibility of parol evidence to prove by general reputation and tradition the southwest corner of Furman's patent, which issued in 1788, and the old line between Virginia and Tennessee. It is well settled that such evidence is admissible. Harriman *v.* Brown, *supra*; Clements *v.* Kyle, 13 Grat. 468, 477. But in this instance, also, similar evidence of the location of the corner had been introduced without objection, and therefore, under the authorities cited, the exception cannot avail. We think, however, that the opinion of the witness Mock that the corner was on the old state line was not competent evidence and ought to have been excluded.

Exceptions 15, 16, and 18 challenge the admissibility of Mock's and Lewis' testimony of what the Debuska had told them concerning the location of the eastern line of the Hunt patent.

In view of the fact that evidence had already been introduced tending to prove that these parties had made similar statements to Gen. Greever, agent of the Douglas Land Company, which had been acted on by him, it is not perceived that the admission of this evidence could have been prejudicial.

Exception 17 is to the admission of the testimony of Lewis that the line between Douglas and Clements was plainly marked.

This objection is founded on the fact that the line had been comparatively recently marked, and that the evidence was self-serving. That question is settled adversely to the exceptor by the case of Clement *v.* Packer, *supra*.

Exception 19 is to the action of the court in overruling the objection to a question propounded to the witness Lewis with respect to the location of the cliff and traditional origin of the name "Cat Face," a projection of rocks on the western slope of Pound Mountain.

The call in the partition deed to Monroe and wife, after leaving the Hunt and Furman line, is for a line east 400 poles over "Cat Face" to a beech and sugar tree on the dividing ridge. Several witnesses testified to the location of that natural monument and the traditional derivation of its name—that the caverns on its face afforded dens to wild cats. We think the evidence was

admissible to identify the cliff and locate the call in the partition deed.

Exception 20 questions the admissibility of the Fulton entry, and is controlled by what was said in regard to exception 9.

We are of opinion that the leases referred to in exceptions 21 and 22 were rightly excluded. It was not shown that either of them covered the land in controversy, nor did their relevancy otherwise appear.

There is no avowal of what answers were expected to the questions whose exclusion is made the ground of exceptions 23 and 24, and, if material, as before observed, the objection could not be considered.

The answer of the witness to the question, the exclusion of which constitutes exception 27, "that he did not know whether there was any controversy over the land referred to," shows that the exception was immaterial.

Exception 28 is to the refusal of the court to strike out the cross-examination of the witness Mock, "wherein he speaks of what Mr. White told him of the controversy having been settled." The exception is amenable to the objection that the exceptor has omitted to point out the specific answers objected to, and for that reason it cannot be regarded. N. & W. Ry. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Hughes *v.* Kelley, 30 S. E. 387, 2 Va. Dec. 588.

We are of opinion that the question and answer which were admitted by the court over the objection of the defendant (exception 29) were merely intended to explain the attitude of counsel in the matter involved and could not have prejudiced the defendant.

The remaining exceptions (save only the last, which is to the refusal of the court to set aside the verdict as contrary to the law and evidence) are to the giving and refusal of instructions.

It is unnecessary to prolong this opinion by specific consideration of these assignments of error. We shall content ourselves with calling attention to one of the instructions which the court gave, the unqualified language of which would naturally have induced the jury to give predominance to what they may have believed the commissioners intended, without regard to what they may have done in establishing the line in controversy. The controlling inquiry in the case at last is the ascertainment of the line fixed by the commissioners and confirmed by the court; and that fact, if proved and acquiesced in by the parties, would take precedence over any presumed intention of the commissioners. On the other hand, the intention of the commissioners, to be gathered from the partition proceedings, in connection with the facts and surrounding circumstances, constitutes an important

factor in aiding the jury to determine the correct location of the line.

In Smith *v.* Davis, 4 Grat. (Va.) 50, the commissioners intended the dividing line to be a straight line between known corners, and directed the surveyor so to run it; but the land was in forest, and the surveyor, without intending it, ran and marked a curved line. The court approved an instruction which told the jury that, if they believed from the evidence that the commissioners intended to run the division line as a straight line between ascertained corners, then a straight line was the true division line, unless they should believe from the evidence that the parties had agreed to and acquiesced in the crooked line. The court also held an instruction erroneous which charged the jury that if the division line was actually run and marked at the time the division was made, and that the line thus made was the crooked line laid down on the plat returned by the surveyor, the crooked line should prevail, although the call of the plat and report of the commissioners was for a straight division line. It will thus be observed that the instruction which the court approved modified the effect which the jury were to allow the intention of the commissioners by acquiescence of the parties in the curved line run and chopped through mistake by the surveyor.

So, in this case, an instruction which ignores the theory of the defendants that the parties had acquiesced in the line for which they contend, and without qualification yields precedence to the supposed intention of the commissioners, is erroneous. See cases cited in note to Smith *v.* Davis, 4 Grat. (Va. Rep. Ann.) 36, and Elliott *v.* Horton, 28 Grat. (Va.) 766, 772.

The prayer in question also contravenes the doctrine of that line of decisions which hold that "an instruction must not call special attention to a part only of the evidence and the fact which it tends to prove, and disregard other evidence relevant to the matter in issue." Seaboard, etc., Ry. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773; Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593; Montgomery's Case, 98 Va. 852, 37 S. E. 1; Boush *v.* Fidelity, etc., Co., 100 Va. 735, 42 S. E. 877.

We are of opinion that, in so far as the ruling of the circuit court in giving and refusing instructions at the previous trial is in conflict with the views expressed in this opinion, it is erroneous. For this reason, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.